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No. 80-613

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

SHOSHONE AND ARAPAHOE TRIBES,
Petitioners,

v.

DRY CREEK LODGE, INC., *et al.*,
Respondents.

MOTION OF ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC. FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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MOTION OF ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC. FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Pursuant to Rule 42(3), the Association on American Indian Affairs, Inc., a tax-exempt organization having its principal office at 432 Park Avenue South, New York, New York 10016, moves the Court for leave to file the attached brief *amicus curiae* in support of the petition for a writ of certiorari in the above-captioned case. The petitioners, the Shoshone and the Arapahoe Tribes, have consented to the filing of this brief; the respondents, Dry Creek Lodge, Inc., *et al.*, have refused so to consent.

The Association on American Indian Affairs, Inc., is a non-profit membership corporation organized under the laws of the State of New York for the purpose, *inter alia*,

of protecting the rights of self-government exercised by Indian tribes. The Association is the largest Indian-interest organization in the United States, and is nationwide in scope, with a membership of 50,000 that consists of both Indians and non-Indians.

The Association frequently has participated in leading cases involving issues of Indian law before the federal and state courts, including the filing of a brief with this Court in *DeCoteau v. District County Court*, 420 U.S. 425 (1975), and the filing of *amicus curiae* briefs in *Andrus v. Glover Construction Co.*, 100 S. Ct. 1905 (1980), *Washington v. Washington State Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979), *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), and *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972).

The Association seeks to file an *amicus curiae* brief in this case because of the far-reaching impact the decision below will have on the ability of Indian tribes to exercise local autonomy and to provide needed governmental services. The immediate parties to the suit have focused primarily upon the circumstances surrounding their particular dispute and are, of course, less concerned with the broader consequences upon every tribal government of

the lower court's decision. To apprise the Court of this impact and to place the dispute in its proper context, the Association respectfully requests that its motion for leave to file the attached brief *amicus curiae* be granted.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC., IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

The Association on American Indian Affairs, Inc., is a non-profit membership corporation organized under the laws of the State of New York for the purpose, *inter alia*, of protecting the rights of self-government exercised by Indian tribes. For many years the Association has been the largest Indian-interest organization in the United States, with a membership nationwide of over 50,000 that consists of both Indians and non-Indians. The Association previously has filed *amicus curiae* briefs with this Court in major cases affecting Indian rights, such as

Washington v. Washington State Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979), *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), and *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977).

This case presents a question of great and continuing concern to the Association: whether the Indian Civil Rights Act of 1968 waives implicitly every Indian tribe's traditional immunity from suit. In the instant proceeding, the Association is concerned with that broad question in a specific context -- namely, whether the Indian Civil Rights Act subjects tribes to money-damage suits by non-Indians in a federal forum.

The importance of this question to longstanding principles of Indian self-determination cannot be overemphasized. If the Court of Appeals' decision is allowed to stand, already deficient tribal economies will be severely strained by the cost of defending numerous suits and of paying deep-pocket money judgments. Vital tribal programs designed to provide needed services or to advance economically the status of tribal members will face new and unprecedented monetary shortfalls, while the inability of tribal governments to satisfy pressing needs of the populace will cause disrespect for the sovereign's authority. Qualified tribal members will not serve in their government from fear of personal liability or harassing suits. Tribal forums will find their authority further undercut as important local issues involving non-Indians are decided by federal courts less sensitive to tribal customs and mores. Indian tribes will be denied the opportunity themselves to determine where, if, how or in what manner tribal immunity needs to be circumscribed in order to fulfill the purposes of the Indian Civil Rights Act, and instead will face intolerable pressures to waive completely their sovereign immunity.

Amicus submits the attached brief in support of the petition for a writ of certiorari to assist the Court in recognizing that the decision of the court below badly misconstrues the purpose and meaning of the Indian Civil Rights Act, contravenes numerous decisions of this Court concerning the nature and scope of tribal immunity from suit, and, if uncorrected, could have a devastating impact upon tribal autonomy and self-sufficiency. The immediate parties are likely not to consider the broader ramifications of the Court of Appeals' decision, and this discussion by *amicus* may be helpful to the Court in considering the importance of the case.

STATEMENT OF THE CASE

For purposes of this brief, *amicus curiae* adopts the "Statement of the Case" found in the petition for a writ of certiorari at pages 3-8.

REASONS FOR GRANTING THE WRIT

I

THE COURT OF APPEALS' DECISION JEOPARDIZES THE CONTINUED VIABILITY OF INDIAN TRIBAL GOVERNMENTS.

The Court of Appeals' holding constitutes the first appellate decision sanctioning the award of money damages against an Indian tribe in any forum. If not reversed, the adverse impact such a ruling will have upon Indian self-determination and economic well-being cannot be overstated.

At the most immediate level, the lower court's decision that the Indian Civil Rights Act contains a waiver of sovereign immunity for the benefit of non-Indian plaintiffs

will vitiate the "firm federal policy of promoting tribal self-sufficiency and economic development," *White Mountain Apache Tribe v. Bracker*, 100 S. Ct. 2578 (1980). *See, e.g.*, the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§450 *et seq.*; the Indian Financing Act of 1974, 25 U.S.C. §§ 1451 *et seq.*; the Indian Reorganization Act of 1934, 25 U.S.C. §§461 *et seq.* The fiscal realities of Indian life are such that the inescapable costs even of successfully defending civil suits in a distant forum, not to mention unexpected (and possibly undeserved) large money judgments,[1] will seriously impair the operations and thereby the effectiveness of tribal governments. Specifically, the lion's share of tribal income now is committed to projects designed to provide at least minimum levels of governmental services on the reservation and to improve the economic level and employment of Indians thereon. By opening the door to suits by non-Indians, however, the lower court's ruling will result in reducing tribal initiatives and simultaneously in draining tribal finances at the expense of achieving these essential goals. Indeed, since Indians are among the poorest minority groups in America and because most tribal income results from fixed annual rentals and the sale of depletable natural resources, rather than from taxes, tribal governments often will not be able to raise the revenues needed both to finance additional litigation and to maintain existing governmental services.

The effect of the lower court's decision, then, cannot be reconciled either with Congress' general policy to

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[1] Although tribal budgets are quite small in terms of the needs which must be met, to an individual juror tribes might seem quite wealthy, and the danger of deep-pocket jury verdicts against tribes would be quite real, as the facts of this case illustrate.

foster tribal self-sufficiency or with its particular intent in the Indian Civil Rights Act to further Indian self-government, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62 (1978). The lower court's decision, moreover, is particularly hard to defend in that, despite the greater need of Indian tribes for immunity from suit, the decision foists upon tribal governments a broader waiver of immunity for non-Indian plaintiffs than either the federal or most state governments have seen fit to bestow upon their own citizens.

In an even more fundamental sense, the Court of Appeals' decision will be destructive of tribal sovereignty. The success of Indian autonomy depends largely upon the ability of tribal governments to attract qualified people into public service. The lower court's conclusion that tribes no longer are immune from certain suits for money damages, however, raises serious questions regarding the ability of tribal officials to claim the benefit of the tribes' previous immunity from suit. *See Ex parte Young*, 209 U.S. 123 (1908); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949); *Davis v. Littell*, 398 F.2d 83, 84 (9th Cir. 1968), *cert. denied*, 393 U.S. 1018 (1969). The uncertainties raised by the lower court's holding will deter many qualified Indians from serving in their government and will dissuade those serving from vigorously prosecuting their duties.[2]

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[2]The relative poverty of many tribal governments increases the risk that an officer may be faced with a personal judgment for attempting to fulfill his duties. At a minimum, many tribal governments will be unable or unwilling to defend or reimburse officials who arguably exercised poor judgment in delimiting their lawful authority.

Equally detrimental to tribal autonomy will be the effect of the Court of Appeals' decision in pre-empting a balanced, evolutionary response by each tribe to its own immunity in a manner consistent with its sovereign status and promotive of its self-government. As tribes are well aware, the legislative history of the Indian Civil Rights Act indicates that tribal failure to enforce and apply the substantive provisions of that Act will result in additional federal remedies less desirable than those presently found in the Act. *See, e.g.,* 113 Cong. Rec. 13473 (1967) (Statement by Senator Ervin); *Santa Clara Pueblo v. Martinez, supra.* That Act gave tribal governments every incentive to determine where, how, and in what manner the mandates of the ICRA could be satisfied with the least disruption to their form of government and their cultural values.[3]

The decision below, however, sweeps aside this self-determined, developmental response to tribal immunity, and subjects tribes to suits in federal court whenever the plaintiff is a non-Indian. Moreover, regardless of any tribally adopted qualifications upon sovereign immunity, complaints by non-Indians still would be cast in the language of civil rights deprivations in order to ensure entry into a federal forum where tribal customs and values would be largely ignored. The result would be to undermine tribal authority as prospective Indian plaintiffs saw their governments permit limited tribal funds to be

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[3]Tribes might find themselves, for example, able to waive their immunity from torts up to the extent of their insurance coverage. Alternatively, injunctive and declaratory relief may be fully adequate for other types of suits. Similarly, certain issues may raise sensitive cultural issues which could be resolved satisfactorily only in a tribal forum.

expended to reimburse non-Indians for wrongs which are not subject to redress if committed against Indians. Tribes would face intolerable pressures to waive their immunity for their own citizens, even though economically or politically such action would be self-defeating.

In short, unless this Court grants the writ of certiorari and reaffirms its decision in *Santa Clara Pueblo v. Martinez*, *supra*, Indian self-government may be harmed irreparably.

II.

THE DECISION OF THE COURT OF APPEALS CONTRAVENES DIRECTLY LONGSTANDING PRECEDENTS OF THIS COURT UPHOLDING TRIBAL IMMUNITY FROM SUIT.

The sovereign status of Indian tribes, evidenced by treaty and recognized judicially since the earliest day of the Republic, is beyond question. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *United States v. Kagama*, 118 U.S. 375, 381-82 (1886). A principal attribute of a tribe's sovereign status, also long recognized and continuously given effect, is its immunity from suit absent express consent from Congress. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Puyallup Tribe, Inc. v. Washington Dep't of Game*, 433 U.S. 165 (1977); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940); *Turner v. United States*, 248 U.S. 354 (1919); *Thebo v. Choctaw Tribe*, 66 F. 372 (8th Cir. 1895).[4] As

[4]Despite conquest, the full powers of internal sovereignty are vested in Indian tribes and in their duly constituted organs

[footnote continued]

an attribute of the tribes' pre-existing sovereign status (and not as an application of their immunity from suit), tribal government actions are not limited by constitutional civil rights guarantees applicable to federal or state governments. *Talton v. Mayes*, 163 U.S. 376 (1896); *Santa Clara Pueblo v. Martinez*, *supra*; *Native American Church v. Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959).

In *Santa Clara Pueblo v. Martinez*, *supra*, this Court exhaustively reviewed the structure and legislative history of the Indian Civil Rights Act (ICRA). The Court there held that the ICRA modified the tribes' sovereign status to the extent that many of the civil rights guarantees previously applicable only to federal or state governments were now applicable to tribal government actions, but also held that the Act had not affected a distinct aspect of sovereignty, tribal immunity from suit. More specifically, since the Act had not expressly waived the tribe's immunity from suit, and since the legislative history contained no unequivocal expression of an intent to waive this immunity, the Court concluded in *Martinez* that "suits against the tribe under the ICRA are barred by its sovereign immunity from suit." 436 U.S. at 59.

The Court of Appeals in this case ruled that when the plaintiff is a non-Indian, seeking money damages for

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except as expressly otherwise qualified. *See, e.g.*, Cohen, *Handbook of Federal Indian Law*, 123 (1942); *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89, 94 (8th Cir. 1956). As a concomitant of this sovereignty, tribes are immune from suit, and such immunity has long been held to be waived only upon express consent. *United States v. United States Fidelity & Guaranty Co.*, *supra*, 309 U.S. at 512-14; *United States v. King*, 395 U.S. 1 (1969); *Santa Clara Pueblo v. Martinez*, *supra*, 436 U.S. at 58-59.

alleged violation of his constitutional rights, a federal court has jurisdiction over a suit against sovereign Indian tribes, or, in other words, that the ICRA implicitly waived tribal immunity under such circumstances. Yet, judicial recognition of a tribe's immunity from suit has never previously depended upon whether the plaintiff was a non-Indian or an Indian. *Compare Puyallup Tribe, Inc. v. Washington Dep't of Game, supra* (non-Indian plaintiff); *United States v. United States Fidelity & Guaranty Co., supra* (non-Indian plaintiff); *Turner v. United States, supra* (non-Indian plaintiff); *Bottomly v. Passamaquoddy Tribe,* 599 F.2d 1061 (1st Cir. 1979) (non-Indian plaintiff); *Thebo v. Choctaw Tribe, supra* (non-Indian plaintiff) *with e.g., Santa Clara Pueblo v. Martinez, supra* (Indian plaintiff). Similarly, tribes have been held immune from suit when the plaintiff sought monetary damages, *United States v. United States Fidelity & Guaranty Co., supra; Turner v. United States, supra,* and where the plaintiff sought declaratory or injunctive relief, *Santa Clara Pueblo v. Martinez, supra; Puyallup Tribe, Inc. v. Washington Dep't of Game, supra.* Tribal immunity and tribal sovereignty have also been respected when the plaintiff has raised constitutional challenges. *Santa Clara Pueblo v. Martinez, supra*; *Talton v. Mayes, supra. Cf. Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691 (1949) (A suit may "fail as one against the sovereign even if it is claimed that the officer being sued has acted unconstitutionally. . . ."); *United States v. Testan,* 424 U.S. 392, 401-02 (1976) (Monetary relief against United States for even constitutional challenges would not be permitted unless the sovereign had expressly mandated such relief); *Iowa Public Service Co. v. Iowa State Commerce Comm'n,* 407 F.2d 916 (8th Cir.), *cert. denied,* 396 U.S. 826

(1969) (Sovereign immunity barred suit against state even though plaintiff asserted denial of due process).[5]

Amicus respectfully suggests that a writ of certiorari should be issued to review and reverse the Court of Appeals' doubtful determination of what otherwise seems a well-settled question of sovereign immunity.

III.
THE LOWER COURT'S DECISION IS INCONSISTENT WITH CONGRESSIONAL INTENT IN ENACTING THE ICRA

As this Court noted in *Santa Clara Pueblo v. Martinez*, 436 U.S. at 59, the Indian Civil Rights Act has no significant legislative history expressing a congressional intent to waive tribal immunity from suit. Particularly, there is a total absence of evidence supporting an intent to waive this immunity only for non-Indian plaintiffs.

In *Santa Clara*, this Court held the ICRA did not waive the sovereign immunity of the tribe or its officers when an Indian sued his tribe or its agents for alleged constitutional violations. Yet, the initial and predominate concern of Congress in enacting Title I of the Indian Civil Rights Act, 25 U.S.C. § § 1301-03, was to "protect individual *Indians* from arbitrary and unjust actions of tribal

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[5] A felt circumstance of particular, if not primary, importance to the Court of Appeals was the need to provide plaintiffs in this case with some forum for settlement of their grievances. 623 F.2d at 684, 685. Courts, however, have not hesitated to limit a plaintiff's remedies against the sovereign only to those expressly provided by statute even though the claimed rights might not adequately be vindicated by those express remedies. *Dugan v. Rank*, 372 U.S. 609 (1963); *Larson v. Domestic & Foreign Commerce Corp., supra; Simons v. Vinson*, 394 F.2d 732 (5th Cir.), *cert. denied*, 393 U.S. 968 (1968); *Switzerland Co. v. Udall*, 337 F.2d 56 (4th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965).

governments" by securing "*for the American Indian* the broad constitutional rights afforded to other Americans," *Senate Committee on the Judiciary, Protecting the Rights of the American Indian,* S. REP. No. 841, 90th Cong., 1st Sess. 6 (1967) (emphasis added); *Santa Clara Pueblo v. Martinez,* 436 U.S. at 61, 62.

Given Congress' predominate concern in enacting the ICRA to protect the rights of individual Indians in their relations with their tribal governments,[6] and given this Court's determination that the Act did not waive tribal immunity in constitutional challenges by an Indian to actions of his tribal government, it is inconceivable that Congress could be presumed to have intended to waive that immunity when a non-Indian sued a tribe.[7]

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[6]Statutory revisions expanding ICRA protections to non-Indians appear to have been an afterthought. *See* Burnett, *An Historical Analysis of the 1968 "Indian Civil Rights" Act,* 9 Harv. J. Legis. 557, 602 n.239 (1972); *Dodge v. Nakai,* 298 F. Supp. 17, 24 (D. Ariz. 1968).

[7]What little legislative history there is supports this conclusion. As noted in *Santa Clara,* 436 U.S. at 66-68, Congress rejected proposals permitting *de novo* trials in federal courts and authorizing the Attorney General to investigate complaints and bring suit in federal courts. *See* Ziontz, *In Defense of Tribal Sovereignty: An Analysis of Judicial Error in Construction of the Indian Civil Rights Act,* 20 S.D.L.Rev. 1, 10-20 (1975). Congress' rejection of proposals requiring federal court enforcement of the ICRA is contrary to the lower court's decision to permit such suits by non-Indians.

Similarly, the costly impact of the Court of Appeals' decision is inconsistent with Congress' decision to remove many federal constitutional protections too costly to tribal governments. *See, e.g., Constitutional Rights of the American Indian: Hearings on S.961-S. 968, S.J. Res. 40 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary,* 89th Cong., 1st Sess. 17-19, 64-65 (1965); Burnett, *supra* note 6 at 590-91. Thus the right to

[footnote continued]

CONCLUSION

For the foregoing reasons, *amicus curiae* urges the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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counsel is at defendant's expense and the right to jury trial in civil actions of $20 or more was eliminated; grand jury indictments for felonies are not required; and six-person juries are permitted.